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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty

Yearly supplement of the Secretary-General to his quinquennial report on capital punishment

Summary

The present report is submitted pursuant to resolution 26/2 of the Human Rights Council. It examines possible consequences of the imposition and application of the death penalty on the enjoyment of various human rights, including human dignity, the right to life, the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, the right to a fair trial and the right to equality and non-discrimination. It also examines the impact on the enjoyment of human rights by children of parents who are sentenced to death or executed, and other individuals associated with sentenced persons, and the consequences of the lack of transparency in the imposition and application of the death penalty.

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I. Introduction

1. The Human Rights Council, in its resolution 26/2, requested the Secretary-General to dedicate the 2015 annual supplement to his quinquennial report on capital punishment to the consequences arising at various stages of the imposition and application of the death penalty on the enjoyment of the human rights of those facing the death penalty and other affected persons.

2. On behalf of the Secretary-General, in March 2015, the Office of the High Commissioner for Human Rights sent notes verbales to various stakeholders, including States, international, regional and intergovernmental bodies, national human rights institutions and non-governmental organizations, requesting relevant information to enable the Secretary-General to prepare his report. Information received has been included in the present report to the extent possible.[1]

3. The Secretary-General draws the attention of the Human Rights Council to his ninth report on capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty (E/2015/49), which finds that the marked trend towards abolition and restriction of the use of capital punishment in most countries continues. Attention is also drawn to other recent reports outlining various human rights consequences of the use of the death penalty.[2]

4. The present report examines possible consequences of the imposition and application of the death penalty on the enjoyment of various human rights, including human dignity, the right to life, the right to freedom from torture or other cruel, inhuman or degrading treatment or punishment, the right to a fair trial and the right to equality and non-discrimination. It also examines the impact on the enjoyment of human rights by children of parents who are sentenced to death or executed, and other individuals associated with sentenced persons. It further examines the human rights consequences of the lack of transparency in the imposition and application of the death penalty.

II. Consequences of the imposition and application of the death penalty on the enjoyment of the human rights of those facing the death penalty

A. Human dignity

5. The Universal Declaration of Human Rights of 1948 provides that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. The dignity of the human person is inherent in any right protected by international human rights law. Dignity lends real meaning to human rights, and as such is inherent in any right protected by international human rights law.

6. In the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, which was adopted in 1989, States parties recognize that abolition of the death penalty contributes to enhancement of human

[1] All submissions are on file with the Secretariat and available for consultation.

[2] See A/63/293 and Corr.1, A/65/280 and Corr.1, A/67/226, A/69/288, A/HRC/18/20, A/HRC/21/29, A/HRC/24/18, A/HRC/27/23, E/CN.4/2006/53/Add.3, A/HRC/10/44, A/67/275 and A/67/279.

dignity. Furthermore, the General Assembly has justified, in resolutions adopted during the past eight years and supported by an increasing majority of Member States, its calls for a moratorium on executions with a view to abolishing the death penalty, by stating that the use of the death penalty undermines human dignity (see resolutions 62/149, 63/168, 65/206, 67/176 and 69/186). In its guidelines on the death penalty, the European Union considers that the death penalty constitutes a serious violation of human rights and human dignity.[3] The Community of Portuguese-speaking Countries stated that the death penalty is an intolerable and inhuman attack on human dignity and a violation of human rights.[4] Forty-two member States of the Council of Europe also pointed out that "the death penalty is an intolerable affront to human dignity, and goes hand in hand with numerous violations of the human rights of the condemned and their families".[5]

7. In their submissions relating to the present report, as well as policy statements issued at various forums, several States referred to human dignity as a key argument for the abolition of the death penalty. For instance, Albania stated that "this kind of punishment is not compatible with human rights principles and constitutes a direct insult to human dignity"; Canada viewed that "the death penalty is incompatible with respect for human dignity and the value of human life"; the Holy See explained that its abolitionist position is "framed within the proper ethical context of defending the inviolable dignity of the human person and the role of the legitimate authority to defend in a just manner the common good of society"; Namibia indicated that "the death penalty undermines human dignity, which is inherent to every human being"; Portugal noted that "it opposes the death penalty in all circumstances, as it represents an irreversible loss of the right to life and a gross violation of human rights, and it is an unjustified attack on human dignity"; and the United Kingdom of Great Britain and Northern Ireland expressed the view that "the death penalty undermines human dignity".

8. The constitutions of several countries stipulate that the death penalty undermines human dignity. For instance, the Constitution of Côte d'Ivoire recognizes the need to respect human dignity and prohibits "any punishment leading to the deprivation of human life". The Constitution of Finland states that "no one shall be sentenced to death, tortured or otherwise treated in a manner violating human dignity". The Interim Constitution of Nepal provides that "every person shall have the right to live in dignity, and no law shall provide for the death penalty".

9. A significant number of national courts have also referred to human dignity in relation to the death penalty. In *Gregg v. Georgia*, Justice Brennan of the Supreme Court of the United States of America filed a dissenting opinion stating that "the fatal constitutional infirmity in the punishment of death is that it treats members of the human race as nonhumans, as objects to be toyed with and discarded. It is thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity".[6] The Canadian Supreme Court has recognized that capital punishment constitutes a serious invasion of human dignity, and several judges expressed the opinion that the death penalty "is the supreme indignity to the individual, the ultimate corporal punishment, the final and complete lobotomy and the absolute and

[3] See www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/601_dpguidelines_/601_dpguidelines_en.pdf.

[4] Statement issued by the Community of Portuguese-speaking Countries on 5 March 2014 before the Human Rights Council (on file with the Secretariat and available for consultation).

[5] Statement issued by 42 member States of the Council of Europe on 5 March 2014 before the Human Rights Council (on file with the Secretariat and available for consultation).

[6] See https://law.resource.org/pub/us/case/reporter/US/428/428.US.153.74-6257.

irrevocable castration".[7] The Hungarian Constitutional Court has held that capital punishment imposes a limitation on the essential content of the fundamental rights to life and human dignity, eliminating them irretrievably. The Court stressed the relationship between the rights to life and dignity, and the absolute nature of these two rights, which together were the source of all other rights.[8] In the *Makwanyane* case, the South African Constitutional Court found that the death penalty was unconstitutional and observed that "the rights to life and dignity are the most important of all human rights and the source of all other personal rights ... By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals".[9]

B. Right to life

10. Article 3 of the Universal Declaration of Human Rights states that everyone has the right to life, liberty and security of person, while article 6 (1) of the International Covenant on Civil and Political Rights provides that every human being has the inherent right to life, which is to be protected by law, and that no one is to be arbitrarily deprived of his life. In its general comment No. 6 (1982) on the right to life, the Human Rights Committee described the right to life as the supreme right. The Special Rapporteur on extrajudicial, summary or arbitrary execution referred to it as "the ultimate metaright, since no other right can be enjoyed without it" (see A/67/275, para. 12) and "the most important and basic of human rights. It is the fountain from which all human rights spring. If it is infringed, the effects are irreversible" (see E/CN.4/1983/16, para. 22).

11. More than 40 years ago, in December 1971, the General Assembly, in its resolution 2857 (XXVI), stated that in order fully to guarantee the right to life, provided for in article 3 of the Universal Declaration of Human Rights, the main objective to be pursued was that of progressively restricting the number of offences for which capital punishment might be imposed, with a view to the desirability of abolishing that punishment in all countries. The international move towards abolition gained new impetus with the adoption in 1989 of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, which to date has been ratified by 81 States.

12. The drafters of the International Covenant on Civil and Political Rights already paved the way towards the abolition of the death penalty in 1966 by mentioning the death penalty as an exception to the right to life, which should in no way be "invoked to delay or to prevent the abolition of capital punishment" (art. 6 (6)) and by establishing stringent conditions under which it could be used. Trends with regard to the implementation of the stringent conditions contained in article 6 (2–5) can be gleaned from recent quinquennial and annual reports of the Secretary-General on the use of the death penalty (see, for example, E/2010/10 and E/2015/49).

13. The Council of Europe has adopted two instruments prohibiting the use of capital punishment: protocols No. 6 (1983) and No. 13 (2002) to the European Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty. Article 2 of the Charter of Fundamental Rights of the European Union also provides that no one shall be condemned to the death penalty, or executed. The Protocol to

[7] See http://scc-esc.lexum.com/scc-esc/scc-esc/en/item/785/index.do.
[8] See www.mkab.hu/letoltesek/en_0023_1990.pdf.
[9] See https://h2o.law.harvard.edu/collages/12436.

the American Convention on Human Rights to Abolish the Death Penalty was adopted in 1990. While the African Charter on Human and Peoples' Rights, which was adopted in 1981, does not make any specific reference to the death penalty, the African Commission is in the process of developing an optional protocol to the Charter on the abolition of the death penalty in Africa.

14. About half of the 102 countries and territories in the world that, to date, have abolished the death penalty for all crimes, enshrined its prohibition in their constitutions, often making explicit the link with the rights to life and physical integrity.[10] For instance, the Constitution of Armenia states that "everyone shall have a right to life", and "no one shall be condemned to the death penalty or executed"; the Constitution of the Plurinational State of Bolivia provides that "every person has the right to life and physical, psychological and sexual integrity" and "the death penalty does not exist"; the Constitution of Cambodia holds that "everybody shall have the right to life, freedom and personal security. Capital punishment is prohibited"; the Constitution of Colombia stipulates that "the right to life is inviolable" and "there will be no death penalty"; the Constitution of Côte d'Ivoire states that "the rights of the human person are inviolable" and "any punishment leading to the deprivation of human life is forbidden"; the Constitution of Honduras states that "the right to life is inviolable, and the death penalty is prohibited"; and the Constitution of Kyrgyzstan states that "everyone shall have an inalienable right to life" and "no one may be arbitrarily deprived of life; the death penalty is prohibited".

15. Furthermore, several national courts have found the death penalty to violate the right to life. The Albanian Constitutional Court abrogated the death penalty as incompatible with its 1998 Constitution, stating that "the death penalty is a denial of the right to life and constitutes inhuman and cruel punishment".[11] The Hungarian Constitutional Court declared that the death penalty violates the "inherent right to life" provided under article 54 of the country's Constitution, and thereby abolished the death penalty for all crimes in Hungary.[12] The Constitutional Court of Lithuania declared that the Criminal Code provision on the death penalty contradicted the Constitution, which stipulates that the right to life shall be protected by law.[13] The South African Constitutional Court also used the right to life argument as reasoning for declaring that the death penalty violated the Constitution.[14] The Constitutional Court of Ukraine declared the death penalty unconstitutional and the laws providing for it void, by referring to the right to life. It noted that, unlike the International Covenant on Civil and Political Rights, the Ukrainian Constitution does not explicitly allow for the death penalty as an exception to the right to life.[15] Several other States have also referred to the right to life as key for the abolition of the death penalty (see, for example, A/63/293, para. 17 and A/HRC/27/26, para. 25).[16]

16. With regard to States in which the death penalty is still used, international human rights law, including article 6 (2) of the International Covenant on Civil and Political Rights, "imposes stringent requirements that must be met for judicial killing not to be regarded as an arbitrary deprivation of life and therefore unlawful" (see A/67/275, para. 13). Article 6 (2) of the Covenant requires that, in countries that have not yet abolished the death penalty, the application of the death penalty be limited to the "most

[10] For a discussion on how the death penalty violates the right to life, see Hugo Adam Bedau, "Capital Punishment and the Right to Life", *Michigan State Law Review*, vol. 2011, No. 3, pp. 505–522.
[11] See www.deathpenaltyproject.org/legal-resources/authorities-database/search/?id=1111.
[12] See www.deathpenaltyproject.org/legal-resources/authorities-database/search/?id=1175.
[13] See www.deathpenaltyproject.org/legal-resources/authorities-database/search/?id=1113.
[14] See www.saflii.org/za/cases/ZACC/1995/3.html.
[15] See www.codices.coe.int/NXT/gateway.dll/CODICES/full/eur/ukr/eng/ukr-2000-1-003.
[16] The original contributions are on file with the Secretariat and are available for consultation.

serious crimes". This term has been interpreted to mean that the death penalty should only be applied to the crime of intentional killing. The Human Rights Committee has repeatedly stressed that the use of the death penalty for drug-related crimes does not meet the threshold of the most serious crimes.[17] However, the death penalty continues to be applied in 33 countries or territories for drug-related crimes. Some States also continue to use the death penalty for other crimes or acts not involving intentional killing, such as consensual sexual acts, economic and political crimes, robbery, blasphemy, witchcraft and sorcery.

17. The Human Rights Committee has also concluded that mandatory death sentences are not compatible with the most serious crimes. According to the Human Rights Committee, laws that impose the death penalty without any possibility of the defendant's personal circumstances or the circumstances of the particular offence being taken into account constitute violations of the right to life under the Covenant.[18] The Inter-American Court of Human Rights[19], the African Commission on Human and Peoples' Rights[20] and the national courts in Bangladesh,[21] India,[22] Kenya[23], Malawi[24] and Uganda[25] have also declared that the mandatory death penalty is incompatible with the right to life.

18. The prohibition of executions for crimes committed by persons under the age of 18 is provided in several international and regional human rights treaties, in particular in article 6 of the International Covenant on Civil and Political Rights and article 37 of the Convention on the Rights of the Child. The prohibition on the execution of pregnant women is also set out in article 6 of the International Covenant on Civil and Political Rights. In its resolution 69/186, the General Assembly calls on all States not to impose capital punishment for offences committed by persons below 18 years of age, on pregnant women or on persons with mental or intellectual disabilities. Moreover, in its resolution 1989/64, the Economic and Social Council recommended that States establish a maximum age beyond which a person may not be sentenced to death or executed.

C. Right to a fair trial

19. The death penalty may be carried out only pursuant to a final judgement rendered by a competent court after a legal process that provides all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of, or charged with, a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.

20. In July 2007, the Human Rights Committee adopted its general comment No. 32 (2007) on article 14: right to equality before the courts and tribunals and to a fair trial,

[17] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15792&LangID=E.

[18] See, inter alia, communications No. 1520/2006, *Mwamba v. Zambia*, Views adopted on 10 March 2010, para. 6.3; No. 1132/2002, *Chisanga v. Zambia*, Views adopted on 18 October 2005, para. 7.4; No. 845/1998, *Kennedy v. Trinidad and Tobago*, Views adopted on 26 March 2002, para. 7.3; and No. 2177/2012, *Johnson v. Ghana*, Views adopted on 27 March 2014, para. 7.3.

[19] See www.cidh.oas.org/demandas/12.480%20Lennox%20Boyce%20et%20al%20Barbados%2014%20dec%202006%20ENG.pdf.

[20] See www.achpr.org/communications/decision/240.01/.

[21] See www.supremecourt.gov.bd/web/documents/808470_CivilAppealNo.116of2010.pdf.

[22] See www.lawyerscollective.org/files/IHRN%20judgment.pdf and http://indiankanoon.org/doc/166513655/.

[23] See http://kenyalaw.org/Downloads_FreeCases/76411.pdf.

[24] See www.eji.org/files/Kafantayeni%20v.%20Attorney%20General.pdf and *Jacob v. The Republic*, criminal appeal No. 18 of 2006 (judgement on file with the Secretariat and available for consultation).

[25] See www.ulii.org/ug/judgment/constitutional-court/2005/8.

which details State parties' obligations under article 14 of the International Covenant on Civil and Political Rights, and reaffirms that scrupulous respect of the guarantees of a fair trial is particularly important in trials leading to the imposition of the death penalty, and that, therefore, the imposition of a death sentence following a trial in which the provisions of article 14 of the Covenant have not been respected constitutes a violation of the right to life.

21. The death penalty is of particular concern when imposed by military courts and tribunals, especially on civilians. The Working Group on Arbitrary Detention has concluded that military justice systems should be prohibited from imposing the death penalty under all circumstances (see E/CN.4/1999/63, para. 80).

22. Recently, a new phenomenon of sentencing large groups of individuals in mass trials has emerged and led to major concerns that such mass trials violate international human rights standards regarding fair trial guarantees. In particular, those trials appear to have been marred by procedural irregularities, including a lack of adequate, timely access to lawyers and instances of trials in absentia, and a lack of respect for the presumption of innocence (see A/HRC/27/23 and Corr.1, paras. 43–53). Pursuant to general comment No. 32 (2007) of the Human Rights Committee, the presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with that principle.

23. Effective assistance by defence counsel is an important element in the right to a fair trial in capital cases. Article 14 (3) (d) of the International Covenant on Civil and Political Rights requires States parties to provide legal assistance to indigent defendants "in any case where the interests of justice so require". The Human Rights Committee has observed that "it is axiomatic that legal assistance be available in capital cases" and concluded that "the absence of counsel constituted unfair trial".[26] The Committee against Torture has also urged States parties to guarantee effective assistance by legal counsel for death row inmates at all stages of proceedings.[27] In December 2012, the General Assembly adopted the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, recognizing the right to legal aid for persons facing the death penalty at all stages of the criminal justice process.[28]

24. Article 6 (4) of the International Covenant on Civil and Political Rights states that anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. It also states that amnesty, pardon or commutation of the sentence of death may be granted in all cases. Therefore, national laws must provide the possibility of, and corresponding procedure for, granting amnesty, pardon and commutation of death sentences for humanitarian and other reasons.

[26] See communications No. 223/1987, *Robinson v. Jamaica*, Views adopted on 30 March 1989, paras. 10.3–12 and No. 1096/2002, *Kurbanov v. Tajikistan*, Views adopted on 6 November 2003, para. 6.5.

[27] See CAT/C/JPN/CO/2, para. 15.

[28] See General Assembly resolution 67/187, annex, para. 20.

D. Right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment

25. In his 2009 report, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment explored whether the death penalty was compatible with the prohibition of cruel, inhuman or degrading punishment under international law (A/HRC/10/44). He noted that the interpretation of legal provisions was subject to change over time, as had been the case with the prohibition of corporal punishment. The prohibition of corporal punishment had evolved to the point that it was now considered a direct assault on the dignity of a person and should be qualified by all relevant human rights bodies as cruel, inhuman or degrading punishment. He concluded that maintaining the distinction between a dynamic interpretation that finds that corporal punishment is prohibited, while upholding that capital punishment is compatible with international law, was increasingly difficult.

26. The Special Rapporteur has concluded that "a new approach is needed as there is evidence of an evolving standard within international bodies and a robust State practice to frame the debate about the legality of the death penalty within the context of the fundamental concepts of human dignity and the prohibition of torture and cruel, inhuman or degrading treatment or punishment. This evolving standard, along with the resulting illegality of the death penalty under such prohibition, is developing into a norm of customary law, if it has not already done so" (see A/67/279, para. 74).

27. In examining whether the death penalty per se violates the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, recent jurisprudence should be taken into consideration. For example, in 2013, the European Court of Human Rights ruled that "whole life" sentences with no possibility of review and no prospect of release constituted inhuman and degrading treatment and punishment, and were in breach of the prohibition of torture and ill-treatment.[29]

28. In statements before various international forums, several States and regional bodies have indicated that the death penalty is a violation of the prohibition of torture or other cruel, inhuman and degrading treatment or punishment. Bulgaria stated that it considered the death penalty to be an extreme form of physical and psychological violence for human beings and as such, it constituted cruel, inhuman and degrading treatment or punishment. Denmark expressed the view that the death penalty was brutal and inhuman, no matter how cruel the offence. Finland considered the death penalty a cruel and inhuman form of punishment. Italy classified capital punishment as inhuman treatment. Mongolia justified the abolition of capital punishment by referring to the degrading character of the death penalty. Slovenia considered that the death penalty constituted cruel, inhuman and degrading treatment and a violation of international law. Spain held that the death penalty was cruel and inhuman treatment. The European Union stated that it found the death penalty to be cruel and inhuman, representing an unacceptable denial of human dignity and integrity.[30]

29. National courts have also expressed similar views. For instance, in the case of *People v. Anderson*, California Supreme Court in the United States of America found that "the cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are

[29] See http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-122664#{%22itemid%22:[%22001-122664%22]}

[30] Copies of the relevant statements are on the file with the Secretariat and are available for consultation.

carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture".[31] In 2001, in the case *United States v. Burns*, the Canadian Supreme Court stated that capital punishment engaged the underlying values of the prohibition against cruel and unusual punishment.[32] Furthermore, the Constitutional Courts of Albania, Hungary, Lithuania, South Africa and Ukraine have also found that the death penalty per se violates the prohibition of cruel, inhuman or degrading treatment.

30. States that still use the death penalty do not have unfettered discretion in deciding about the manner in which it is carried out. They should comply with requirements emanating from the absolute prohibition of torture and other cruel, inhuman or degrading treatment under international human rights law. In practice, capital punishment today often leads to violations of this prohibition, either because of the death row phenomenon, or the method of execution.

31. The Secretary General and special procedures mandate holders have extensively discussed this issue in recent reports. They have described circumstances that generally go hand in hand with the death row phenomenon, including the lengthy and anxiety-ridden wait for uncertain outcomes, isolation, drastically reduced human contact and the physical conditions in which some inmates are held. The Human Rights Committee has recognized the death row phenomenon as a possible breach of article 7 of the International Covenant on Civil and Political Rights.[33] Several regional courts have also confirmed the existence and destructive nature of the death row phenomenon.[34]

32. The Human Rights Committee, in its general comment No. 20 (1992) on article 7 (prohibition of torture or other cruel, inhuman or degrading treatment or punishment) also recognized that, when the death penalty is imposed, it must be carried out in a manner that causes "the least possible physical and mental suffering" (para. 6). Having examined relevant international, regional and national jurisprudence on various methods of execution, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment concluded that there was a growing trend towards scrutiny of all methods of execution that had to date been considered as not causing severe pain and suffering. He found no categorical evidence that any method of execution currently in use complied with the prohibition of torture and cruel, inhuman or degrading treatment. Even if the required safeguards (Economic and Social Council resolution 1984/50, annex) were respected, all methods of execution currently used could inflict inordinate pain and suffering (see A/67/279, paras. 31–40).

E. Right to equality and non-discrimination

33. Non-compliance with the right to equality and non-discrimination is a major concern when considering the application of the death penalty. In practice, the decision whether to sentence a convict to death or life imprisonment is often arbitrary and devoid of predictable

[31] See www.courtlistener.com/opinion/1260876/people-v-anderson/

[32] See http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1842/index.do

[33] See, for example, communication No. 470/1991, *Kindler v. Canada*, Views adopted on 30 July 1993, para. 6.4.

[34] See, for example, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57619#{%22itemid%22:[%22001-57619%22]}, para. 111, and www.corteidh.or.cr/docs/casos/articulos/seriec_93_ing.pdf.

rational criteria. A number of studies demonstrate that the death penalty is frequently used in a discriminatory manner.[35]

1. Gender discrimination

34. At least 10 States continue to impose and carry out the death penalty in connection with actual or purported engagement in consensual sexual acts, such as adultery and sodomy. As stated by the Human Rights Committee and other human rights mechanisms, laws criminalizing actual or purported engagement by adults in consensual sexual relations, including illicit sex, contravene international human rights law (see A/HRC/29/40).[36] Although the language of such laws may appear not to directly discriminate against women, in practice, their application and enforcement often disproportionately affect women's enjoyment of their rights (see A/HRC/27/23, para. 33). Studies have demonstrated that women are more likely to be sentenced to death for such crimes, owing to deeply entrenched discriminatory societal attitudes and bias against women suspected of adultery or of engaging in extramarital relationships among the judiciary and law enforcement officers.[37]

35. Imposition of the death penalty for offences relating to consensual adult homosexual conduct continues to be provided for in the legislation of a number of States. As a result, men, women and transgender persons have been sentenced to death. While no cases of executions for consensual same-sex conduct have been confirmed in recent years, the mere existence of such laws has an intimidating effect on all lesbian, gay, bisexual, transgender and intersex persons and, as in other places where homosexual relationships are criminalized, reinforces stigma and fuels discrimination and violence against anyone perceived to be lesbian, gay, bisexual, transgender or intersex. Several human rights treaty bodies have expressed concern at the fact that homosexuality is a crime punishable by death in some countries, and have concluded that such punishment violates the provisions of the International Covenant on Civil and Political Rights (see CCPR/C/MRT/CO/1, para. 8, and E/C.12/IRN/CO/2, para. 7). The European Union guidelines on the death penalty emphasize that the death penalty must not be applied or used in a discriminatory manner on any ground, including sex or sexual orientation.

2. Minorities and other marginalized groups

36. Persons belonging to religious and other minorities are frequently exposed to increased risks of criminalization. In some jurisdictions, criminal law specifically targets members of religious minorities or persons practising religions or beliefs that are different from the predominant religious or traditional belief of the country. Reportedly, in 13 countries around the world, people who openly espouse atheism or reject the official State religion face execution under the law.[38] Criticism of religious faith or even academic study of the origins of religions is treated as a crime in these jurisdictions. Furthermore, when manifesting their religions or beliefs, persons belonging to minorities run the risk of being accused of blasphemy, a charge which in some countries carries harsh sanctions, even the death penalty (see A/HRC/22/51, para. 53). In some States, individuals who converted from one religion to another have been arrested and sentenced to death, and national laws

[35] See www.ohchr.org/Documents/Issues/DeathPenalty/MovingAwayDP.pdf, chap. 3.

[36] See also CCPR/C/79/Add.25, para. 8; CCPR/C/79/Add.85, para. 8 and Human Rights Council resolutions 2007/77 and 2005/59.

[37] See http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/04/SGreportDeathPenalty-AnalysisBrief-2014.pdf.

[38] See https://drive.google.com/file/d/0B3gXFZt5sXX1aDJLblBMbjBxd0E/view.

make the death penalty mandatory for apostates.[39] In accordance with international human rights jurisprudence, apostasy, blasphemy and specific religious practices do not meet the most serious crimes threshold.[40] It appears that the racial or ethnic origin of the victim and of the defendant in capital cases is also a major factor in determining who is sentenced to death in some States. Recent studies document racial discrimination in the death penalty system in the United States of America, and show that this problem, which persists unabatedly, is not restricted to a single region of a country.[41]

3. Foreign nationals

37. According to estimates, nationals of at least 50 States are currently on death row or have recently been executed abroad, and reports suggest that foreign nationals may be disproportionately affected by the death penalty in several States (see A/HRC/27/23, para. 55 and A/HRC/24/18, para. 74). International standards and safeguards relating to death penalty cases should apply equally to persons facing the death penalty abroad. However, such persons often face discrimination: they can be arbitrarily and disproportionately affected by the death penalty because they are not familiar with the laws and procedures in the prosecuting State. They may have limited access to legal aid and inadequate and low quality legal representation. They may not understand and speak the language in which proceedings are conducted, in particular when denied the free assistance of an interpreter, which is required under article 14 (3) (f) the International Covenant on Civil and Political Rights. They are also less likely to have a support network of family and friends.[42]

38. Access to consular assistance for foreign nationals is an important aspect of the protection of those facing the death penalty abroad. The Inter-American Court of Human Rights has ruled that the denial of the right to consular notification constitutes a violation of due process, and that the execution of a foreign national deprived of his or her right to consular services constitutes an arbitrary deprivation of life, in contravention of article 4 of the American Convention on Human Rights and articles 6 and 14 of the International Covenant on Civil and Political Rights.[43] The requirement that foreign nationals must be informed of their rights without delay after their arrest has been confirmed by the International Court of Justice.[44]

4. Poor or economically less privileged individuals

39. Poor or less privileged individuals who do not have access to effective legal representation are frequently disproportionately subjected to the death penalty. In many States, the most important factor in determining whether a defendant will be sentenced to death is the quality of the legal representation of an accused person. Around the world, a large number of defendants in capital cases cannot afford to pay their own lawyers. In many cases, Government-appointed defence lawyers are overworked, underpaid and lack the experience required for death penalty cases. The Special Rapporteur on extrajudicial, summary or arbitrary executions pointed out that failure to provide adequately funded state-wide public defenders had the predictable result of inadequate legal representation for

[39] See, for example, CCPR/C/IRN/CO/3, para. 23, E/CN.4/1994/7, para. 475, and E/CN.4/1998/6, para. 62.

[40] See, for example, CCPR/C/79/Add.85, para. 8.

[41] See www.deathpenaltyinfo.org/death-penalty-black-and-white-who-lives-who-dies-who-decides#Executive Summary.

[42] Penal Reform International, *Strengthening death penalty standards* (London, 2015), p. 17.

[43] See www1.umn.edu/humanrts/iachr/b_11_4p.html.

[44] See www.icj-cij.org/docket/files/128/8188.pdf.

defendants in capital cases (see A/HRC/11/2/Add.5). In a recent judgement, the Supreme Court of India referred to poverty as a new mitigating factor to commute a convict's death penalty to life imprisonment. It stated that socioeconomic compulsions such as poverty were factors that should be considered by Courts while awarding a death sentence.[45] Research into death row prisoners in India has found that the overwhelming majority of the convicted individuals are poor and from lower castes.[46]

III. Consequences arising at various stages of the imposition and application of the death penalty for the enjoyment of the human rights of other affected persons

A. Children of parents sentenced to death or executed

40. The negative impact on the human rights of children whose parents are subject to the imposition and execution of the death penalty has received increasing attention.[47] In its resolution 68/147 on the rights of the child, adopted in 2013, the General Assembly acknowledges that a parent's deprivation of liberty, sentencing to death or life imprisonment has a serious impact on children's development, and urges States, in the framework of their national child protection efforts, to provide the assistance and support those children may require. Also in 2013, the Human Rights Council adopted resolution 22/11 on a panel on the human rights of children of parents sentenced to the death penalty or executed. In September 2013, at the panel organized by the Council, experts highlighted a number of negative short- and long-term effects of a parent's death sentence on his or her children, including infringement of the enjoyment of a range of rights and obligations set out in the Convention on the Rights of the Child. These included, in particular, the obligation to ensure that the best interests of the child are duly taken into account and protected (art. 3); the right to be free from violence, in particular mental violence (art. 19); the right to special protection and assistance provided by the State when a child is deprived of his or her family environment (art. 20); and the right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development (art. 27 (1)) (see A/HRC/25/33).

41. In October 2013, the Committee on the Rights of the Child recommended that Kuwait assess and fully take into account the best interests of the child in judicial proceedings where parents are involved and when sentencing parents to death (see CRC/C/KWT/CO/2, para. 32).

42. In her recent report to the Human Rights Council, the Special Rapporteur on the independence of judges and lawyers expressed concern that, despite the particular emotional and psychological distress of children whose parents were sentenced to death — who also often experienced social isolation and stigmatization — the support they were given was very limited. She therefore recommended that prosecutors and judges consider the best interests of the defendant's children before requesting and ordering the death penalty (see A/HRC/29/26, para. 77).

[45] See http://judis.nic.in/supremecourt/imgs1.aspx?filename=40836.
[46] See www.outlookindia.com/article/most-death-row-convicts-are-poor/292798.
[47] See www.ohchr.org/EN/NewsEvents/Pages/HiddenVictims.aspx.

B. Defence lawyers

43. The welfare and mental health of lawyers can be negatively affected by participating in a case involving the death penalty, in particular when a client is executed. Recommendation R (2000) 21 of the Committee of Ministers of the Council of Europe to member States on the freedom of exercise of the profession of lawyer states that bar associations should promote the welfare of members of the profession and assist them or their families if circumstances so require (principle V (4) (e)).

44. In accordance with the Basic Principles on the Role of Lawyers, lawyers' access to their clients and confidentiality between lawyers and their clients are essential rights of the accused.[45] These may be restricted in practice in cases involving the death penalty if the person sentenced to death is in a prison that is not easy to access for the lawyer or in which there are restrictions on all visitors.

45. Defence lawyers are crucial stakeholders in any death penalty related process, particularly post-conviction lawyers who attempt to stop an execution. The looming threat of execution and the fact that the life or death of a client depends on the lawyer's intervention put enormous pressure on the lawyer. In addition, the number of lawyers who are experienced and knowledgeable in this area is insufficient to meet the number and needs of persons convicted to the death sentence.[46] Reportedly, strong public support for the death penalty and a corresponding lack of respect for lawyers who represent people on death row pose additional challenges.[47]

C. Prison officials, including medical personnel

46. Some prison officials who have participated in overseeing prisoners sentenced to death or executions have reported negative effects on their mental health, in some cases experiencing symptoms consistent with post-traumatic stress disorder or becoming isolated and withdrawn. Somewhat similar concerns may emerge in cases in which prison officials involved in overseeing death rows or executions are discouraged from quitting through ridicule, bullying or demotion.[51]

47. Around the world, medical associations have questioned to what extent their members, whose professional ethics require them to be healers and not executioners, may be involved in the implementation of the death penalty. This issue arises regularly, but not exclusively, in the case of lethal injections, where States expect medical personnel to participate in the administration of lethal drugs and monitoring of the onset of death. A global study found that "virtually all codes of professional ethics which consider the death penalty oppose medical or nursing participation. Despite this, many death penalty States have regulations specifying that health professionals be present at executions".[52] It is clearly established under international law and codes of medical ethics that physicians and other medical personnel should not participate in torture or other cruel, inhuman or degrading treatment or punishment. For example, the Principles of Medical Ethics relevant to the Role

[45] See, for example, principles 8, 16 and 22.

[46] See Susannah Sheffer, *Fighting for Their Lives: Inside the Experience of Capital Defense Attorneys* (Nashville, Tennessee: Vanderbilt University Press, 2013).

[47] Submission from Penal Reform International dated 13 May 2015 (on file with the Secretariat and available for consultation).

[51] Penal Reform International, "Prison guards and the death penalty" (London, 2015), p. 3. Available at www.penalreform.org/wp-content/uploads/2015/04/PRI-Prison-guards-briefing-paper.pdf.

[52] Amnesty International, "Execution by lethal injection: A quarter century of state poisoning", October 2007, p. 3.

of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly in its resolution 37/194, includes such a provision. The Special Rapporteur on extrajudicial, summary or arbitrary executions observed that, from the perspective of ethics, given that medical personnel should not help to torture, they should not be asked to assist with executions, at least not where such executions might violate international law. States should be cognizant of those considerations when they called for the presence or assistance of medical personnel when administering the death penalty (see A/67/275, para. 97).

IV. Consequences of the lack of transparency in the application and imposition of the death penalty on the enjoyment of human rights

48. In its resolution 1989/64, the Economic and Social Council set out minimum requirements of transparency. It called upon all Member States to publish annually information about the use of the death penalty for each category of offence for which the death penalty is authorized, as well as information about the use of the death penalty. The information should include the number of persons sentenced to death, the number of executions actually carried out, the number of persons under sentence of death, the number of death sentences reversed or commuted on appeal and the number of instances in which clemency has been granted. Information on the extent to which the safeguards referred to in the resolution are incorporated in national law should also be included. The lack of transparency has direct consequences for the human rights not only of the persons sentenced to death, but also for other affected persons.

A. Right to a fair trial and due process

49. Transparency is fundamental to the administration of justice. A transparency safeguard is contained in article 14 (1) of the International Covenant on Civil and Political Rights. The Human Rights Committee observed that transparency "is a duty upon the State that is not dependent on any request by the interested party".[51]

50. The Special Rapporteur on extrajudicial, summary or arbitrary executions has emphasized that "transparency is the surest safeguard of fairness … Over time, punishment imposed by Governments has come to replace private acts of retribution. This has rationalized the disposition of justice, yet it has also introduced the possibility of more systematic arbitrariness. The extraordinary power conferred on the State — to take a person's life using a firing squad, hanging, lethal injection, or some other means of killing — poses a dangerous risk of abuse. This power may be safely held in check only by public oversight of public punishment. It is a commonplace that due process serves to protect defendants. However, due process is also the mechanism through which society ensures that the punishments inflicted in its name are just and fair" (see E/CN.4/2006/53/Add.3, para. 7).

[51] See communication No. 215/1986, *Van Meurs v. the Netherlands*, Views adopted on 13 July 1990, para. 6.1.

B. Prohibition of torture and other cruel, inhuman and degrading treatment

51. As illustrated by the Views of the Human Rights Committee in two cases, for a convict and his or her family, a lack of transparency in what is already a harrowing experience — waiting for one's execution — can result in inhuman or degrading treatment or punishment within the meaning of article 7 of the International Covenant on Civil and Political Rights. In relation to an individual complaint submitted by the mother of an executed prisoner, the Committee found that "the complete secrecy surrounding the date of execution and the place of burial and the refusal to hand over the body for burial have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress".[54] This amounts to inhuman treatment in violation of article 7 of the Covenant. In another case, the Committee found that the delay of approximately 20 hours before communicating a reprieve to the accused just 45 minutes prior to his scheduled execution constituted a violation of article 7 of the Covenant.[55]

52. The Committee against Torture has also expressed deep concern over the unnecessary secrecy and uncertainty surrounding executions. It noted that refusing to provide advance notice of the date and time of execution to convicted persons and their family members was a clear human rights violation (see, for example, CAT/C/JPN/CO/2, para. 15).

C. Right to information

53. The Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that article 14 of the International Covenant on Civil and Political Rights addresses not only the rights of accused persons but also the public's right to information on the use of the death penalty. States have a duty to make information on the death penalty publicly available (see E/CN.4/2006/53/Add.3, para. 12). The Special Rapporteur has stated that article 19 of the Covenant also generates transparency requirements in recognizing not only freedom of expression but also public access to information (see A/65/275, para. 108). In *Toktakunov v. Kyrgyzstan*, the Human Rights Committee found that information about a State's use of the death penalty was of public interest.[56] The Committee consequently recognized a general right to gain access to that information deriving from article 19. The idea of a public right to information finds further support in the emergence of a right to truth. In the context of the death penalty, this would create the public's right to the information needed to establish whether deprivation of life is arbitrary or lawful (see A/67/275, paras. 108 and 109).

54. In its resolution 69/186 on moratorium on the use of the death penalty, the General Assembly called upon all States to make available relevant information, which can contribute to informed and transparent national and international debates, including on the obligations of States pertaining to the use of the death penalty. The lack of reliable information is also a serious impediment to scrutiny by the international human rights system. In some cases, not having advance knowledge of an imminent execution makes examining questions of lawfulness before an execution and advising about obligations under international law impossible.

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[54] See communications No. 886/1999, *Schedko v. Belarus*, Views adopted on 3 April 2003, para. 10.2, and No. 887/1999, *Staselovich v. Belarus*, Views adopted on 3 April 2003, para. 9.2.

[55] See communication No. 210/1986, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989, para. 13.7.

[56] See communication No. 1470/2006, *Toktakunov v. Kyrgyzstan*, Views adopted on 28 March 2011.

V. Conclusions and recommendations

55. As the Secretary-General has noted on several occasions, the death penalty has no place in the twenty-first century. In the light of the evolution of international human rights law and jurisprudence and State practice, the imposition of the death penalty is incompatible with fundamental tenets of human rights, in particular human dignity, the right to life and the prohibition of torture or other cruel, inhuman or degrading treatment or punishment. The application of the death penalty often also violates the right to equality and the principle of non-discrimination. The decision about whether to sentence a convict to death or to lesser punishment is often arbitrary and does not necessarily follow predictable, rational criteria. In that judicial lottery, the odds are often stacked against the poor, minorities and other common targets of discrimination, including women, foreign nationals and lesbian, gay, bisexual, transgender and intersex persons.

56. All measures aimed at ending the application of the death penalty are steps towards the enjoyment of the right to life. In its article 6, the International Covenant on Civil and Political Rights, adopted in 1966, referred to the abolition of the death penalty in terms that strongly suggest that it is desirable. In 1989, by adopting the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, States enshrined their stronger abolitionist stance in international law. The Secretary-General reiterates his call for universal ratification of the Second Optional Protocol, and urges those States that have not yet ratified it to do so without delay.

57. The 70 years since the United Nations came into being have seen a remarkable shift from a large majority of Member States that maintained the death penalty to, nowadays, a minority. Since 1997, the General Assembly has adopted five resolutions that called on States to establish a moratorium on executions with a view to abolishing the death penalty. Currently, approximately 160 of the 193 Member States of the United Nations have abolished the death penalty or introduced moratoriums, either in law or in practice. States should go beyond simply ceasing executions and aim for a suspension of capital punishment for all who might be, or have been, sentenced to death. National prosecutors may consider refraining from seeking the death penalty. Judges may consider not imposing it. In this regard, the highest judicial bodies could issue judicial directives or sentencing guidelines, as appropriate.

58. The continued lack of transparency on the part of some Governments concerning the numbers of persons who have been executed is incompatible with human rights. States should refrain from carrying out executions in secret and strive to take all measures necessary to guarantee access to information on the death penalty, including advance notice to family members regarding the date of execution.

59. States that continue to apply the death penalty should comply with international human rights requirements, as stipulated in article 6 of the International Covenant on Civil and Political Rights. In particular, capital punishment may be imposed only for most serious crimes, that is, intentional killing, and may not be mandatory in such cases. States should also adhere to fair trial guarantees in capital cases. Clemency, pardons and commutations are critical steps towards the abolition of the death penalty. Heads of State and Government and other responsible State authorities should exercise their constitutional and/or legal authority to grant amnesty, pardon or commutation of the sentence of death in all cases.

60. States should consider developing measures to minimize the harm suffered by other persons affected by the death penalty, including family members of convicts,

defence lawyers, prison staff and medical staff. In particular, under the Convention on the Rights of the Child, States must take measures to ensure that children's rights, including the principle of the best interests of the child, are duly considered during sentencing.